

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Signed

76-6030 76-6036

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUTH K. CHILD and THE NATIONAL BANK OF
NORTHERN NEW YORK, As Executors of the
Last Will and Testament of ELIZABETH M.
HAAS, Deceased, and WATERTOWN CEMETERY
ASSOCIATION,

Appellants

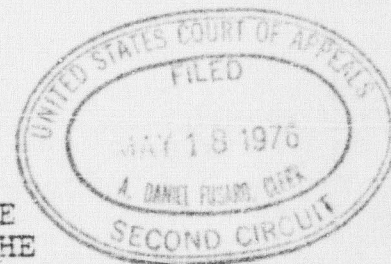
v.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR THE APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK



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ASSOCIATION,

Appellants

v.

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Appellee

BRIEF FOR THE APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

STATEMENT OF THE ISSUES PRESENTED

1. Whether the court below properly held that bequests to two cemetery associations were not deductible for federal estate tax purposes, since the recipient associations are not "organized and operated exclusively" for religious or charitable purposes within the meaning of Section 2055(a) of the Internal Revenue Code of 1954.
2. Whether the District Court properly dismissed the complaint of the residuary legatee, the Watertown Cemetery Association, for lack of jurisdiction.

STATEMENT OF THE CASE

The National Bank of Northern New York as executor of the last will and testament of Elizabeth M. Haas,^{1/} and the Watertown Cemetery Association appeal from a judgment of the United States District Court for the Northern District of New York (Honorable Edmund Port) denying a refund of estate taxes paid by the estate and dismissing the complaint of Watertown Cemetery Association for lack of jurisdiction entered on December 12, 1975. (R. 6a.)^{2/} Timely notice of appeal was filed on February 4, 1976. (R. 5a.) Jurisdiction is conferred on this Court by 28 U.S.C. Section 1291.

The facts of the case may be summarized as follows:

Elizabeth M. Haas died on January 15, 1966, leaving a will which contained the following provisions (R. 55a):

EIGHTH: I give and bequeath to GROVE CEMETERY ASSOCIATION OF LaFargeville, New York, the sum of Twenty-Five Thousand Dollars (\$25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing-up the monuments, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery.

1/ The complaint also named Ruth K. Child, co-executor, as a party plaintiff. Subsequent to the filing of the complaint, Ruth K. Child died, leaving the bank as the sole executor. (R. 54a.)

2/ "R." references are to the separately bound record appendix.

TWENTY-FIRST: All the rest, residue and remainder of my property, real and personal of every name and nature, I give, devise and bequeath to THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF TRINITY CHURCH, Watertown, New York, and THE WATERTOWN CEMETERY Association, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used.

The estate filed a timely estate tax return and paid the tax computed thereon, claiming a deduction from the gross estate for the bequests in paragraphs Eighth and Twenty-First to the two cemetery associations under Section 2055(a)(2) of the Internal Revenue Code of 1954, as transfers for charitable or religious purposes. Upon audit, the Commissioner of Internal Revenue disallowed these deductions, and assessed an additional tax in excess of \$920,000 which was paid (with interest) by the estate. (R. 55a.)

The estate filed a timely claim for refund, which was disallowed by the Commissioner to the extent of \$916,085.78 in June of 1970. (R. 56a.) The estate and the Watertown Cemetery Association (the Association) thereupon filed this action seeking a refund of that amount, plus interest and costs. (R. 56a.)

Both cemeteries to which the bequests in question were made were incorporated pursuant to Chapter 133 of the New York Laws of 1847 entitled "An Act Authorizing the Incorporation of Rural Cemetery Associations." At the time of decedent's death, both were governed by the New York Membership Corporation Law (now the Not-For-Profit Corporation Law). (R. 56a-57a.) It was stipulated below (R. 57a) that no part of the net earnings of either association inures to the benefit of any private stockholder or individual other than an object of the purpose of the association; that no substantial part of the activities of either association is in carrying on propaganda, or otherwise attempting to influence legislation; and that neither association participates in, or intervenes in, any political campaign on behalf of any candidate for public office. Both associations were incorporated in the mid-eighteen hundreds for the sole purpose "of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead"(R. 57a, 58a), and the sole activity of both associations is the ownership, operation and maintenance of a cemetery (R. 57a, 58a). Currently, the Association is exempt from income tax under the provisions of Section 501(c)(13) of the Internal Revenue Code of 1954. (R. 70a.)

The Association's only revenues arise from the sale of burial plots, charges for care and maintenance of burial plots, income and endowments and funds set aside for maintenance purposes, and gifts and bequests. (R. 59a.) The

Association's perpetual care fund was established in 1882, but amounts paid into that fund in prior years for particular plots do not produce sufficient income to pay the cost of present day care for those plots. (R. 65a.)

The Association maintains a chapel building (built in 1882), which is used for the storage of bodies during the winter months by other area cemeteries and funeral directors. (R. 64a.) The Association charges a fee for the storage to cover the cost of storage, plowing the road to the building, and handling the bodies. (R. 124a.)

The Association entered into an agreement with the other residuary legatee, the rector and churchwarden of Trinity Church, that since the residuary estate had been divided 61 percent to the church and 39 percent to the Association, any refund of estate taxes would be the sole property of the Association. After the payment of the estate taxes by the estate, the Association received approximately \$1,500,000 as its share of the residue. (R. 80a.)

When the estate filed its refund claim, Watertown Cemetery Association joined in the claim (R. 37a) as a party claimant.^{3/} The Association also joined in the complaint in this action as a party-plaintiff. (R. 25a, 28a.)

The District Court determined that it had no jurisdiction to hear the refund suit by the Association and dismissed the complaint. The Association appeals from that holding. From

^{3/} The Grove Cemetery Association, which received the \$25,000 bequest, has never participated in this litigation.

the District Court's holding that neither cemetery association is "organized and operated exclusively" for charitable or religious purposes within the meaning of Section 2055(a)(2) of the Internal Revenue Code of 1954, and the estate is thus not entitled to the refund sought, both the estate and the Association appeal.

SUMMARY OF ARGUMENT

1. Section 2055(a)(2) provides a deduction for transfers of property "to or for the use of any corporation organized and operated exclusively for religious [or] charitable * * * purposes." The estate here seeks a refund of estate taxes paid based on a claimed deduction under Section 2055(a)(2) for bequests to two cemetery associations. The District Court held that the two cemetery associations are not organizations described in Section 2055(a)(2), and that the estate was thus not entitled to the refund sought. That decision is correct, and should be affirmed.

From the inception of the income tax, cemetery associations have been treated separately from charitable organizations for exemption from tax purposes. Charitable and religious organizations are exempt from income tax under Section 501(c)(3) of the Internal Revenue Code of 1954, which is phrased in the same terms as Section 2055(a)(2) of the estate tax provisions. Cemetery associations, on the other hand, are exempt from the income tax under Section 501(c)(13), and the

legislative history of that section makes it clear that Congress did not consider cemeteries charitable or religious within the accepted meaning of those terms. Further, there is no estate tax provision parallel to Section 170(c)(5) of the income tax law which permits a charitable contribution deduction for gifts to not-for-profit cemetery companies. The absence of a corollary provision under the estate tax law is a strong indication that Congress had no intention of granting an estate tax deduction for transfers to such associations, unless the association otherwise qualified as a "charity" under the general definition of that term. Under common law, the sole reason cemeteries were considered charitable was to allow the creation of perpetual care funds without violating the rule against perpetuities. It is clear that under both the common law and the Internal Revenue Code, providing a place to bury the dead is not considered charity or a charitable function. The estate's contention here -- that providing a place to bury the dead is a charitable activity per se -- is contrary to these principles, and should be rejected.

Moreover, the fact that the cemetery associations may have engaged in some public service or charitable activities is not sufficient to place the cemeteries in the category of charitable organizations, since as this Court has held, the existence of one substantial nonexempt purpose precludes the organization from falling within the qualifying language of "exclusively

for a religious [or] charitable * * * purpose." The sole function of these cemetery associations is to provide a place to bury the dead--a nonexempt activity. The District Court correctly determined the estate was not entitled to a deduction under Section 2055(a)(2) for the bequests to the two cemetery associations.

2. The District Court properly dismissed the complaint of the Watertown Cemetery Association. Section 1346(a), 28 U.S.C. is a grant of jurisdiction to the District Courts to hear refund suits by taxpayers. The Watertown Cemetery Association is not the taxpayer here, but is merely one of two residuary legatees. There has been no showing that 28 U.S.C. Section 1346(a) was intended to allow a suit against the United States to recover alleged tax overpayments to be brought by another party who, at best, is interested in the outcome of the suit.

The judgment of the District Court should be affirmed in all respects.

ARGUMENT

I

THE DECEDENT'S BEQUESTS TO TWO CEMETERY ASSOCIATIONS ARE NOT DEDUCTIBLE BY THE ESTATE AS TRANSFERS TO RELIGIOUS OR CHARITABLE ORGANIZATIONS, SINCE THE RECIPIENT ASSOCIATIONS ARE NOT "ORGANIZED AND OPERATED EXCLUSIVELY" FOR RELIGIOUS OR CHARITABLE PURPOSES WITHIN THE MEANING OF SECTION 2055(a) OF THE INTERNAL REVENUE CODE

A. Introduction

Section 2055(a)(2) of the Internal Revenue Code of 1954, Appendix, infra, allows a deduction in computing the taxable

estate for federal estate tax purposes in the amount of bequests "to or for the use of any corporation organized and operated exclusively for religious, [or] charitable * * * purposes * * *, no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The taxpayer here, the estate of Elizabeth M. Haas, seeks to deduct under Section 2055(a)(2) a \$25,000 bequest to the Grove Cemetery Association of LaFargeville, New York, which permits the use of the income only to be used for the general care of the cemetery, and a bequest of approximately \$2,500,000 to the endowment fund of the Watertown Cemetery Association of Watertown, New York.

Since the deduction under Section 2055 is conditioned on the transfer of property to organizations described in that section, the sole substantive question on this appeal is whether the two cemetery associations are "organized and operated exclusively" for charitable or religious purposes.^{4/}

^{4/} It was stipulated below that no part of the cemeteries' earnings inured to the benefit of any private stockholder or individual, and that the cemeteries did not engage in any form of propaganda or attempt to influence legislation.

The District Court found that neither corporation is a religious or charitable corporation, nor was established exclusively for religious or charitable purposes, and accordingly sustained the Commissioner's disallowance of the claimed deductions.

On appeal, the estate and the Association suggest that the two cemetery associations serve a "charitable" purpose within the meaning of Section 2055(a)(2), and the estate is therefore entitled to a deduction. (Br. 20.) Their theory is that if the cemeteries did not provide a place to bury the dead, the cost of so doing would be imposed on the public, and therefore, the cemeteries provide a public service by lessening the burden of Government. (Br. 25.) Since the income tax Regulations under Section 501 define charity as, inter alia, "lessening the burdens of Government" (Section 1.501(c)(3)-1(d)(2), Treasury Regulations on the Income Tax (1954 Code), Appendix, infra), the argument concludes that these two cemetery associations are "charitable" organizations within the meaning of Section 2055(a)(2). The estate attempts to support this assertion by reliance on the New York statute which deems donations to cemeteries to be charitable and benevolent (Br. 15-16), and the purported judicial definition of the term "charitable" (Br. 22-24).

The Government, however, maintains that the Internal Revenue Code does not include cemetery associations in the definition of "charities," and, indeed, expressly excludes them from the definition in both Sections 170 and 501, Appendix, infra. These

income tax provisions exempt not-for-profit cemetery associations from the income tax and allow a charitable contribution deduction to such entities, not as "charities" but as a specially treated type of noncharitable, nonreligious organization. The fact that a cemetery is organized under a state not-for-profit corporation statute, and is regulated by the state which deems contributions to the cemetery to be charitable, are factors which are irrelevant in determining whether cemetery associations are "charitable" within the meaning of Section 2055(a)(2).

B. Cemetery corporations organized under state not-for-profit corporation statutes are not necessarily corporations "organized and operated exclusively" for charitable purposes

Neither Section 2055 nor the Regulations thereunder define the term "charitable," but other sections of the Code dealing with exempt organizations and the deductibility of contributions thereto provide definitions of "charitable" which have been applied to Section 2055. These definitions and the legislative history surrounding their enactment must be considered in determining whether these cemetery associations are charitable or religious organizations for purposes of Section 2055.

The wording of Section 2055(a) is virtually identical with that of Section 501(c)(3) (defining, inter alia, charitable, religious, and educational organizations exempt from income tax), Section 170(c) (defining organizations to which contributions

made may be deducted for income tax purposes), and Section 2522 (26 U.S.C.) (defining organizations to which contributions may be made for purposes of the gift tax charitable deduction). Not only should identical statutory language be read in pari materia as a general rule, but the Supreme Court has stated in Helvering v. Morgan's, Inc., 293 U.S. 121, 126 (1934) that --

the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part.

This admonition has been followed by the courts, which have considered the above-mentioned sections all to be subject to the same definitions of "charitable."^{5/} See e.g., McGlotten v. Connally, 338 F. Supp. 448 (D.C. D.C., 1972) (three judge court); Green v. Connally, 330 F. Supp. 1150 (D.C. D.C., 1971) (three judge court).

From the inception of the income tax, cemetery corporations have been treated quite apart from organizations organized and operated exclusively for religious or charitable purposes. Thus, the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, exempted from income taxes both organizations "organized and operated exclusively for * * * charitable * * * purposes" and cemetery associations within the same paragraph. The exemptions were separated in the Revenue Act of 1921, c. 136, 42 Stat. 227,

^{5/} The estate, also following this same approach, relies on the definition of "charitable" provided by the Regulations under Section 501. (Br. 20-23.)

Section 231, paragraphs (5) and (6). Both sections have remained substantially unchanged, and under the Internal Revenue Code of 1954, paragraph (6) of the 1921 Act is now Section 501(c)(3), while paragraph (5) of the 1921 Act is now Section 501(c)(13) of the Code, which exempts from the income tax --

Cemetery companies owned and operated
exclusively for the benefit of their
members or which are not operated for
profit * * *

Prior to the 1954 Code, deductions from gross income were permitted for income tax purposes for gifts to charitable organizations, but were not specifically permitted for gifts to cemeteries. See Sec. 28(o), Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.). Under the 1954 Code, Section 23(o) became Section 170, and Congress added a specific subsection to allow the same deduction for income tax purposes for gifts to cemeteries. Sec. 170(c)(5). The Senate Report (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 30 (3 U.S.C. Cong. & Adm. News (1954), 4621, 4660)) stated that "Your committee's bill extends the deduction for charitable contributions beyond those allowed under present law to contributions made to nonprofit cemetery and burial companies." It is therefore quite clear that Congress has consistently treated not-for-profit cemeteries as not falling within the general definition of charitable organizations for income tax purposes. Since the language of Section 501(c)(3) and of Section 2055(a)(2) is identical; it can reasonably be said that cemetery associations such as those here are not charitable or religious organizations.

Further, as the Court below emphasized (R. 13a-14a) the absence of provisions in the estate tax charitable deduction dealing with transfers to cemetery associations -- in contrast to those contained in Sections 170(c)(5) and 501(c)(13) of the income tax law -- clearly indicates that Congress did not intend bequests to cemeteries to qualify for the deduction under the estate tax as a general rule. Rather, it is evident that, in order to be deductible under Section 2055(a)(2), a bequest must be made to an organization which meets the much more restrictive definition of charitable or religious provided by the Regulations under Section 501(c)(3) (Regulations Section 1.501(c)(3)-1(d)(2)), which provides, in pertinent part:

The term "charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions.

In delineating the "generally accepted legal sense" of the term "charitable," assistance may be derived by analogy to the common law of charitable trusts. Green v. Connally, supra; Eastern Kentucky Welfare Rights Organization v. Simon, 506 F. 2d 1278, 1286 (C.A. D.C., 1974), cert. granted, 421 U.S. 975 (1975). In the case of cemetery associations, this analysis explains why

Congress did not consider cemetery associations to be "charitable" organizations, and separated them from charities in granting them an exemption from the income tax. The common law of charitable trusts has considered gifts in trust to cemeteries as quasi-charitable because cemeteries require a perpetual fund to care for the grave sites, grounds, monuments, markers and facilities. Only by express statutory treatment, or by judicial decision, could such funds be created and maintained in the face of the rules against restraints on alienation and the rule against perpetuities. Thus, many jurisdictions have enacted statutes similar to Section 8-1.5 of the Estates, Powers and Trusts Law, McKinney's Consolidated Laws of New York Annotated, Appendix, infra (see Br. 16), which states that gifts or transfers to cemeteries "shall be deemed to be for charitable and benevolent purposes." Without that section, such gifts to cemeteries would be void as violative of the rule against perpetuities. Indeed, the sole purpose of the enactment of the New York statute was to create an exception to the rule against perpetuities to permit perpetual care funds for cemeteries. Matter of Pearsall, 125 Misc. 634, 211 N.Y.S. 841 (1925); Wood v. Commissioner, 39 T.C. 1, 6-7 (1962) (the only purpose of the New York statute is to permit perpetual care trusts).

This recognition that cemeteries are not charitable at common law, and the explicit differentiation in exemption provisions from income taxes by Congress, is clear indication that cemeteries are not charitable per se.

Thus, both at common law and under the Internal Revenue Code, an organization created for the sole purpose of providing a burial place for the dead is not a charitable organization. Moreover, the fact that such an organization was organized under a not-for-profit corporation law is not helpful in determining whether it falls within the Internal Revenue Code definition of charity or charitable. Estate of Smith v. Commissioner, P-H Memo T.C., par. 61,242 (1961). It is also significant to note that all of the decided cases have denied claimed estate tax charitable deductions for bequests to cemetery associations under Section 2055(a)(2) and its predecessors. Gund's Estate v. Commissioner, 113 F. 2d 61 (C.A. 6, 1940) cert. denied, 311 U.S. 696 (1940); Bank of Carthage v. United States, 304 F. Supp. 77 (W.D. Mo., 1969); Wilber National Bank v. Commissioner, 17 B.T.A. 654 (1929);^{6/} Estate of Haley v. Commissioner, P-H Memo T.C., par. 48,191 (1948). These cases can fairly be read to hold that a cemetery association is not a charitable organization, per se, and, by the same token, providing a place to bury the dead or operating the cemetery as a nonprofit organization is

^{6/} The opinion in Wilber National Bank notes the distinction which well may be helpful in cases of this type -- between "benevolence" and "charity," noting that "charity may be benevolence, but all benevolence is not necessarily charity." 17 B.T.A., p.661. Particular acts of the cemeteries here might arguably rise to the level of "benevolence," but the operation of their affairs over all can hardly be characterized as "charitable."

not, without more, a charitable purpose or function.

See, also, Rev. Rul. 67-170, 1967-1 Cum. Bull. 272; 4 Mertens Law of Federal Gift and Estate Taxation, § 28.23,

pp. 355-356. Put in simplest terms, in order for the estate to qualify for the deduction under Section 2055(a)(2), it must show that the cemetery associations are "organized and operated exclusively for * * * charitable * * * purposes," and this it has failed to do.

The estate attempts to meet this burden by arguing two points -- the first one of which is that since the Association lessens the burdens of government, in providing a place of burial, it complies with what is (assertedly) the current, expanded meaning of "charitable." This proposition, based principally upon language in Dulles v. Johnson, 273 F. 2d 362, 366 (C.A. 2, 1959), cert. denied, 364 U.S. 834 (1960), wherein bequests to the City, County and State Bar Associations of New York were allowed as estate tax charitable deductions, manifestly proves too much, for carried to its logical conclusion this theory would mandate "charitable" status for any not-for-profit organization fulfilling a socially beneficial or desirable role, such as rural electrification cooperatives or civic associations. We submit that however expanded the meaning of "charitable" may now have become, such an interpretation exceeds permissible limits, for these organizations are plainly commercial ventures -- albeit nonprofit.

To be sure, the estate's other principal authority for this "lessening of the burden of government" theory, Eastern Kentucky

Welfare Rights Org. v. Simon, supra, does focus on the health care role of hospitals, as opposed to their earlier status as alms-houses for the poor, but notes that "to qualify as a tax exempt charitable organization, a hospital must still provide [emergency room] services to indigents." 506 F. 2d, p. 1289.

There is no indication, however, that the cemetery associations here provide space or services to indigents to any meaningful extent whatever;^{7/} rather, all that appears (Br. 23-24) is that the Association does maintain a number of burial plots without charge, where no provision for perpetual care was ever made, and whose owners fail to pay annual assessment for such care. In fact the estate never points out - nor does the record reveal -- how large a proportion of the total number of burial plots is represented by the 467 plots which are neither endowed with perpetual care funds nor covered by annual assessments. (R. 65a.)^{8/}

The estate's second line of attack is based on the premise that even under a more traditional test of "charitable" than that of lessening governmental burdens, it qualifies as such an institution. (Br. 23.) Here, however, the estate's facts

^{7/} To the contrary, the record indicates that indigents dying in Jefferson County have their burial costs-- including the Association's charge for perpetual care-- paid for by the County Commissioner of Social Services. (R. 65a.)

^{8/} There is testimony, however, to the effect that there have been about 100 burials per year in the Association's cemetery over the past four years. (R. 115a-116a.) And the cemetery covers about 162 acres. (R. 58a.)

simply do not support its contention. It is apparent from the estate's own summary of the "charitable" activities in which the Association engages (Br. 23), that these are insignificant in light of the Association's principal business, which is to sell burial plots. The assertedly "charitable" activities, while doubtless commendable in and of themselves, are of slight moment, individually or collectively, measured against the Association's primary (and noncharitable) business activity, which is to sell burial plots.

As noted by the District Court (R. 16a), all of the activities to which the cemeteries point to show charitable activity either occurred in the latter part of the last century (providing lots to nonprofit organizations at no or reduced cost (R. 64a)), or are performed only for a fee (providing a winter storage facility for the storage of bodies (R. 16a, 124a)), or are performed to benefit the cemetery as a whole and are required by state law (maintaining grave sites for which no care fees are paid). None of these factors establish that the cemeteries here were, at the time of the decedent's death, engaged in a charitable activity. The estate has simply not sustained its burden of proving the cemetery associations are charitable.

Further, Section 2055(a)(2) requires that an organization to which the bequest is made be organized and operated "exclusively" for the qualifying purpose in order for the bequest to be deductible, and "exclusively" means primarily. St. Louis

Union Trust Co. v. United States, 374 F. 2d 427 (C.A. 8, 1967).

In dealing with the contention that the benefits to the community were indistinguishable from those inuring to the members of a Section 501(c)(4) social welfare organization, this Court has defined the term "exclusively" in the negative (Contracting Plumbers Coop. Restor. Corp. v. United States, 488 F. 2d 684, 686 (C.A. 2, 1973)):

Rather we adhere to the rule that the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes.

See, also, Batter Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945). These cemetery associations were organized to provide a place to bury the dead -- a "non-exempt" purpose. The evidence shows that this is the sole function of the operations of the cemeteries today. Thus, the primary purpose of the associations is a nonexempt function, which precludes both cemetery associations from falling within the definition of Section 2055(a)(2).

Contracting Plumbers, supra.

C. The cemeteries in question are not "religious" organizations within the meaning of Section 2055(a)(2)

The question of whether an organization is a "religious" one in the context of the Code is essentially a question of fact.

4 Mertens Law of Federal Gift and Estate Taxation,

§ 28.20, p. 336. The District Court found the cemetery associations are not religious, (R. 17a.), and there is ample

evidence in the record to support that finding. On appeal, taxpayer does not challenge that finding, but rather refers the Court to the testimony of its expert witness, Dr. Milton Gatch. (Br. 26-27.) The District Court found Dr. Gatch's testimony to be (R. 18a) "so broad and amorphous as to render it meaningless", and pointed out that Dr. Gatch actually concluded the cemeteries are not religious (R. 18a). (See also R. 157a-158a.)^{2/}

The testimony of Mr. Aylward showed that the only part of a burial service that the cemetery performed was the digging of the grave, the lowering of the casket into the grave, and the filling of the grave. (R. 122a-123a.) It would be difficult at best to treat such secular activities --at least without more -- as generally falling within the ambit of "religious," and the estate has not supplied any definition of "religious" broad enough to encompass these functions above. And Dr. Gatch's "Statement on the Religious Functions of Cemeteries" (R. 149a-160a), observed (R. 156a) that cemetery associations in America are religious "in the sense that most charitable institutions derive historically from Christian or other religious institutions." But he conceded that the argument might be raised that such organizations have "passed beyond the boundaries of the legal definition of the word 'religious,' let alone 'exclusively religious.'" (R. 158a.)

^{2/} The trial judge noted (R. 18a) that Dr. Gatch's opinion as to what constituted religious purpose was "virtually equated" with "goodness." See, in this respect, the distinction between "charity" and "benevolence" noted in footnote 6, supra.

In sum, there was no evidence adduced by the estate from which the court below could have concluded that the cemeteries were "organized and operated exclusively for religious * * * purposes," and the existence of their substantial nonexempt purpose precludes any finding that they are exclusively "religious" within the meaning of Section 2055(a)(2). Contracting Plumbers, supra.

II

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT OF THE WATERTOWN CEMETERY ASSOCIATION FOR LACK OF JURISDICTION

Section 1346(a) of 28 U.S.C., Appendix, infra, provides jurisdiction to the District Courts of the United States over:

(1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * *.

This statute constitutes a waiver of sovereign immunity for suits by taxpayers (Phillips v. United States, 346 F. 2d 999 (C.A. 2, 1965); Eighth Street Baptist Church, Inc. v. United States, 431 F. 2d 1193 (C.A. 10, 1970)), or, perhaps, one acting in the interest of the taxpayer (Hofheinz v. United States, 511 F. 2d 661 (C.A. 5, 1975)).

Watertown Cemetery Association is not in fact the "taxpayer" here -- although much (or even all) of the impact of the estate tax burden may fall upon it as a derivative matter. But Section 2002 of the Code (26 U.S.C.) provides that the executor of the estate is the "taxpayer," and where the taxpayer has brought suit,

"no necessity exists for others to act in the taxpayer's interest."
Hofheinz, supra, p. 662.^{10/}

In Hofheinz, supra, the residuary legatee sought to intervene in the refund suit brought by the executor. Relying on this Court's decision in Phillips, supra, the Fifth Circuit held that "neither authority nor reason" allowed the interpretation that 28 U.S.C. Section 1346(a)(1) constituted a waiver of sovereign immunity which would allow a residuary legatee to sue for a refund of estate taxes paid by the estate--the taxpayer. A residuary legatee is one of those who may be affected by the outcome of the suit, and, therefore, is "interested" in, but not a proper "party" to, the refund suit.

The Association claims here (Br. 29-30) that it has the interest of a taxpayer, because the \$916,000 in issue was charged against its interest in the estate by virtue of its agreement with the other residuary legatee that it will bear the entire burden of any amount of tax determined by this Court to be due, or will be entitled to the entire amount of any refund allowed.^{11/} (Br. 28-29.)

^{10/} The Association, we submit is simply an entity which might well seek leave to file a brief as amicus curiae on behalf of the estate - but that is a far cry from joining the proceedings as a party plaintiff.

^{11/} Had the estate assigned the claim for refund to the Association, that assignment would have been void as against the United States under the Act of October 9, 1940, c. 779, 54 Stat. 1029 (31 U.S.C. §203) commonly known as Assignment of Claims Act. The Association as assignee would have had no claim upon which to bring a refund suit in its own name. In Re Freeman, 489 F. 2d 431 (C.A. 9, 1973); Danning v. Mintz, 367 F. 2d 304 (C.A. 5, 1966).

(The executors charged the entire amount of the estate tax deficiency determined by the Commissioner (\$920,367.63) against the Association's share of the residue of the estate. The Association, the other residuary legatee, and the executor have agreed that any refund allowed will become the property of the Association.)

The short answer to this contention is that the Association's agreement cannot serve to confer jurisdiction on the District Court where it otherwise does not exist --and here, as we have noted, there is no jurisdiction except as to suits brought by the taxpayer. The District Court properly determined that it was without jurisdiction to entertain the complaint by the Association.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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MAY, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this Brief has been made on opposing counsel by mailing two copies thereof to each of them on this 17th day of May, 1976, in envelopes, with postage prepaid, properly addressed to each of them, respectively as follows:

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APPENDIX

Estates, Powers and Trusts Law, McKinney's Consolidated Laws of
New York Annotated:

§ 8-1.5. Trusts for cemetery purposes

Dispositions of property in trust for the purpose of the perpetual care, maintenance, improvement or embellishment of cemeteries or private burial lots in cemeteries, and the roadways, lawns, hedges, walks, fences, monuments, structures and tombs in such cemeteries or on such private burial lots are permitted and shall be deemed to be for charitable and benevolent purposes. Such dispositions are not invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries, nor shall they be invalid as violating any existing rule against perpetuities. Nothing herein contained shall affect any existing authority of the courts to determine the reasonableness of the amount of such disposition. Any cemetery association may act as trustee of and execute any such trust with respect to lots, roadways, lawns, hedges, walks, fences, monuments, structures and tombs both within its own cemetery limits and outside of any cemetery under its control but within the county where such cemetery is located, whether or not such power is included among its corporate powers.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

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(c) Charitable Contribution Defined.--For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of --

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(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

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SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

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(c) List of Exempt Organizations.--The following organizations are referred to in subsection (a):

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(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

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SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) In General.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)--

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(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

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28 U.S.C.:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.501(c)(3)-1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

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(d) Exempt purposes--(1) In general. (1) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:

- (a) Religious,
- (b) Charitable,
- (c) Scientific,
- (d) Testing for public safety,
- (e) Literary,
- (f) Educational, or
- (g) Prevention of cruelty to children or animals.

(11) An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (1) of this subparagraph unless it serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

(iii) Since each of the purposes specified in subdivision (1) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose or purposes, exemption will be granted to such an organization regardless of the purpose or purposes specified in its application for exemption. For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it is "charitable".

(2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an "action" organization of any one of the types described in paragraph (c)(3), of this section.

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